Supreme Court, U.S.
FILED

No. 09-838

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In the Supreme Court of the United States

William K. Suter, Clerk

Lucy Fothergill,

Cruz Teresa Del Toro Piñeiro,

Petitioners,

v.

United States

[United States Postal Service],

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether poor judgment in placing parking spaces in front entrance to postal station which resulted in auto accident that caused injury to two post office patrons transacting business inside station is or not the kind of choice or judgment which discretionary function exception to FTCA designed to shield.

2. Whether the government waiver of immunity for injuries resulting from auto accidents in which Postal System is at fault excludes application of discretionary function exception.

3. Whether an adequate allegation of auto accident in which Postal System is at fault mandates trial on the merits under FTCA.

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3. A feckless standard for choice or judgment, will lead to the defeat of the central purpose of FTCA, which is to waive Government immunity from suit in sweeping language.

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SUPREME COURT OF THE UNITED STATES

OCTOBER 2009 TERM

PETITION FOR WRIT OF CERTIORARI

Petitioners Lucy Fothergill and Cruz Teresa Del Toro respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

I. OPINIONS BELOW

The Opinion and Judgment of the First Circuit Court of Appeals, decided on May 21, 2009, affirming the judgments of dismissal of the District Court for the District of Puerto Rico in Fothergill v. United States (United States Postal Service), Civil No. 07-1378 (JP), D. E. 6 of December 26, 2007, and in Del Toro v. United States (United States Postal Service), Civil No. 07-1304 (SEC), D. E. 20 of May 7, 2008, which cases had been consolidated for appeal since they present the same central issue.

II. JURISDICTION

Jurisdiction of the United States District Court for the District of Puerto Rico was based upon 28 U. S. C. § 1346(b) in both the Fothergill and Del Toro civil actions. Jurisdiction in the First Circuit Court of Appeals was based on 28 U. S. C. § 1291. This Court has jurisdiction under 28 U. S. C. § 1254(i).

III. STATEMENT

A. Complaints

1. Injuries Resulting From Auto Accident Inside Postal Station

Both Plaintiffs Fothergill and Del Toro were on April 25, 2005 engaged in the retrieval of correspondence from their respective mailboxes at the United States Postal Station (USPS) in Boqueron, Puerto Rico 00622 when a vehicle breached the premises through the main entrance doors.

Ms. Del Toro was struck by the vehicle, which impact threw her to the floor and she was pinned under the vehicle. She suffered multiple injuries, numerous lacerations, surgery, continuing treatment and therapy, all involving pain and psychological stress and discomfort.

Ms. Fothergill suffered multiple cuts and lacerations for which she was taken by ambulance to the hospital for medication and treatment. All involving pain and psychological stress and discomfort.

2. USPS Negligent For Lacking Means to Protect Inside From Cars Maneuvering In Parking Area

Both plaintiffs submit that USPS has a responsibility to its customers and visitors to provide security and safety and was negligent for lacking the most elemental means to protect the areas inside its facility used by the public to transact their business with USPS from intrusion and injury by the vehicles which maneuver in the immediate parking area.

See Del Toro Complaint, 07-Civ-1304, D. E. 4, 4/11/07, ¶ ¶ 2, 3 & 4; Fothergill Complaint 07-Civ-1378, 5/2/2007, ¶ ¶ 2, 3 & 4.

Each plaintiff presented administrative claim to USPS, which on October 12, 2007 denied each respective claim.

B. Motion to Dismiss

1. Confirms Accident Inside Postal Station, Injuries, Denies Liability

The government did not answer the complaint but, under F. R. Civ. P. 12(b)(1) moved to dismiss for lack of subject matter jurisdiction, urging that the United States is immune from suit because the discretionary function exception applies.

The government proffered the following facts:

That on April 25, 2005 Mrs. Fothergill and Mrs. Del Toro were retrieving their mail near the main entrance of the post office when a motor vehicle crashed into the building and struck them.

That according to the investigation of the USPS, the vehicle involved in the accident was a 1997 Ford Escort automobile owned and operated by a private individual, Maria T. Montalvo Valle (not a party to this action).

That when the car crashed through the front doors, Plaintiff [Fothergill was] hit by it, causing her to hit her head on the P. O. boxes and the fall onto sharp shattered glass that was on the floor. Two other patrons were also injured during the incident.

That when Plaintiff [Del Toro] was struck by the car she was pinned underneath it.

That a postal employee, Jorge Mendez Nazario, stated he heard a loud acceleration followed by a crash and upon arriving at the scene, he observed two women lying on the floor and a man stuck between the door and the vehicle.

That the USPS investigation further revealed the existence of cement barriers in the parking spaces were marked and well defined. The driver of the vehicle, Ms. Montalvo, told an investigating police officer that she confused the brake pedal with the accelerator when attempting to park.

See, Motion to Dismiss Complaint, in Fothergill case 07-Civ-1378, D. E. 5, pgs. 1 & 2, Factual Summary; In Del Toro case, 07-Civ.-1304, D. E. 13, pgs. 1 & 2, Factual Summary.

2. Defendant Characterizes Plaintiff's Charge of Negligence

In its motion to dismiss defendant characterizes plaintiffs allegation of USPS negligence as follows:

> "In essence, Plaintiff is alleging Defendant negligently designed the parking facilities and markings, as well as the entrance, at the post office in Boqueron, Puerto Rico. Plaintiff's Complaint implies that her injuries could have been avoided if USPS had placed some sort of barrier in front of the building's entrance or placed the parking spaces differently."

C. District Court Decisons

1. Del Toro - Lack of Subject Matter Jurisdiction

The district court in the case of Cruz Teresa Del Toro, 07-Civ.-1304, D. E. 20, 5/7/2008 agreed with both the defendant's characterization of the negligence alleged, and the applicability of the exception under § 2680(a):

> "Therefore, if the alleged negligent act - in this case, the USPS failure to maintain security rails to prevent the entry of vehicles in the mailbox area - can be catalogued as a discretionary function, then the Court lacks jurisdiction to entertain the tort action against the U. S." *Gaubert* v. *U. S.*, 499 U. S. 315 (1991) and Berkovitz by *Berkovitz* v. *U. S.*, 486 U. S. 531 (1988).
>
> "We find that the USPS' decision involved social, economic and policy consideration. Because Plaintiff has not averred, much less established that the barriers were required by any law, or internal policy, and having concluded that the determination involves an element of judgment or choice, the discretionary function exception applies in full force."

On that basis the district court granted dismissal of Plaintiff Del Toro's claim under FTCA.

> "In essence, Plaintiff is alleging Defendant negligently designed the parking facilities and markings, as well as the entrance, at the post office in Boqueron, Puerto Rico. Plaintiff's Complaint implies that her injuries could have been avoided if USPS had placed some sort of barrier in front of the building's entrance or placed the parking spaces differently." (Emphasis supplied). Motion to Dismiss, D. E. 13, pg. 6.

See, Addendum, pgs. 1-4

2. Fothergill - Lack of Subject Matter Jurisdiction

The district court in the case of Lucy Fothergill, 07 -Civ.-1378, D. E.6, 26 Dec. 07, likewise posed to itself the question to determine whether the discretionary function exception applied, as follows:

> In considering whether the decision to install barriers in front of the Boqueron Postal facility is a matter of choice, the Court notes first that Plaintiff Fothergill has cited to no mandatory rule or policy requiring barriers between the parking lot and the postal office entrance. Plaintiff has produced no evidence showing that Defendant USA lacked the discretion to determine safety measures at the postal office. Thus, there was no existing obligation on behalf of Defendant to install barriers to the front entrance.

See, Addendum, pgs. 5-9

Again, the fact proffered by the government, not the Plaintiff, that what the Complaint alleges is that had barriers been placed in between the parking lot and the postal office entrance the calamity would have been avoided is the fact basis for analysis whether the discretionary function exception applies.

3. Motions Under Rule 59(e)

Mrs. Fothergill and Ms. Del Toro both moved for reconsideration under Rule 59(e), F. R. Civ. P., Docket #8, 1/6/2008 and Docket#23, 5/16/2008, respectively, citing:

1. That the Court herein has not the facts as a result of discovery;
2. That in motion to dismiss the facts are con sidered in light most favorable to plaintiff;
3. That State Tort Law applies to actions under FTCA;

4. That whether the Act applies or the § 2680(a) exception does is a mixed question of law and fact and defendant has not placed in record facts necessary to dismiss; In the Del Toro Motion under Rule 59(e), plaintiff in addition raised the following issues:

5. That, for example, it need not be a barrier but a marking directing the vehicles not to park in the front entrance to the station, or directing them away from the same;

6. That the Court should amend judgment, and allow for a summary judgment motion in the 3rd case in this matter to go forward in order to avoid risk of inconsistent decisions on the identical matter of fact and law.

D. UNDULY GENEROUS INTERPRETATIONS OF EXEMPTIONS RUN RISK OF DEFEATING CENTRAL PURPOSE OF FTCA

Although the Postal Service Reorganization Act generally "waives the immunity of the Postal Service from suit by giving it the power 'to sue and be sued in its official name,'" Postal Service v. Flamingo Industries (USA) Ltd, 540 U. S. 736, 741 (2004), the statute also provides that the FTCA "shall apply *to tort* claims arising out of activities of the Postal Service," (39 U. S. C. § 409 (c)), Dolan v. Postal Service, 546 U. S. 481, 484 (2006).

The FTCA authorizes private tort actions against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act *or* omission occurred." 28 U. S. C. § 1346 (b)(1). United States v. Olson, 546 U. S. 43, 44 (2005).

FTCA, however, qualifies its waiver of sovereign immunity for thirteen (13) categories of claims, which are set forth in 28 U. S. C. § 2680(a) thru (f) and (h) thru (n).

However, the *Dolan* Court reasons that the general rule that a sovereign immunity waiver "will be strictly construed...in favor of the sovereign, "Lane v. Pena, Sec. of Transportation, 518 U. S. 187, 192 (1996), is unhelpful in the FTCA context, where "unduly generous interpretations of the exemptions run the risk of defeating" the central purpose of the statute, Kosak v. United States, 465 U. S. 848, 853, n.9, which waives the Government immunity from suit in sweeping language." United States v. Yellow Cab Co., 340 U. S. 543, 548 n.5 (1951). Dolan, supra, at 546 U. S. 481, 491-492.

E. FTCA WAIVES IMMUNITY FROM LIABILITY FOR INJURIES FROM AUTO ACCIDENTS WHEN POSTAL SYSTEM EMPLOYEES ARE AT FAULT

Moreover, Congress was most concerned to authorize FTCA liability for injuries resulting from auto accidents in which employees of the Postal System were at fault:

> One of the principal purposes of FTCA was to waive the Government's immunity from liability for injuries resulting from auto accidents in which employees of the Postal System were at fault. In order to ensure that § 2680(b), which governs torts committed by mailmen, did not have the effect of barring precisely the sort of suit that Congress was most concerned to authorize, the draftsmen of the provision carefully delineated the types of misconduct for which the Government was not assuming financial responsibility - - namely, 'the loss, miscarriage, or negligent transmission of letters or postal matter - - thereby excluding, by implication, negligent handling of motor vehicles." Dolan, supra at 546 U. S. 488 citing Kosak at 465 U. S. 855.

See, also, Raila v. United States, 2d Circuit Dkt. No. 03-6057, January 14, 2004, slip. op. at 7. H. R. Rep. No. 77-2245, at 10 (1942)

Thus, the exceptions are not intended to exclude such common-law torts as an automobile collision caused by the negligence of a government employee.

F. DISCRETIONARY FUNCTION EXCEPTION

The Defendant submits that the complaints should be dismissed under Rule 12(b)(1) for lack of jurisdiction over the subject matter, arguing that the United States is immune from suit under the discretionary function exception in 28 U. S. C. § 2680(a), which provides that the provisions of 28 U. S. C. § § 2679 and 1346 do not apply to:

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. 07-Civ. 1304, pg. 3-8; 07-Civ.-1378, pg. 3-8.

G. SUBJECT MATTER JURISDICTION

In this case the district courts below have found lack of subject matter jurisdiction. Federal Courts are courts of limited jurisdiction. Bender v. Williams Area School District, 475 U. S. 534, 541 (1986). The standard of review for determinations regarding subject matter jurisdiction is clear error for factual findings, and de novo for the legal conclusion as to whether subject matter jurisdiction exists. Filetech, S.A. v. France Telecom, S.A., 157 F.3d 922, 930 (2d Cir. 1998). Gambale v. Deutsche, AG, 377 F. 3d 133, 139 (2d Cir. 2004)

Plaintiffs both adequately alleged claims under FTCA based on USPS' failure in their responsibility, that its customers not suffer damages for lack of safety and to foresee as well as to avoid injury and damages from occurring in the premises was not policy driven, and is therefore not protected by the discretionary function exception.

Petitioners submitted the USPS has not carried its burden of proving that the 28 U. S. C. § 2680(a) applies.

The district court must accept the factual allegations in the complaint as true and draw inferences from those allegations in the light most favorable to the plaintiff. Albright v. Oliver, 510 U. S. 266, 268, 114 S. Ct. 807, 810, 127 L. Ed. 2d (1994). The court may not dismiss a complaint unless "it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief." Hover v. Ronwin, 466 U. S. 558, 587, 104 S. Ct. 1989, 2005, 80 L. Ed. 2d 590 (1984).

H. REVIEW OF FIRST CIRCUIT COURT OF APPEALS DECISION

1. APPELLANTS ARGUMENT

To both district courts' findings bellow plaintiffs replied: "[b]ut what the plaintiff/appellant alleges is that USPS allowed the facilities in question in a condition that lacked "the most elemental means" to protect its customers and the public from being injured by cars maneuver

ing in the area immediate to the inside of the postal station.

See, Revised Brief on Appeal for each plaintiff, at pg. 4.

Moreover, the summary of the Argument in each Appellant's Revised Brief, at pg. 9, is defined as follows:

"Neither the USPS decision to place the handicapped parking spaces in the front of the front doors, nor the failure since then to place the same at the sides and leave the spaces in front of the doors free of vehicles, is the kind of judgment that the 'discretionary function' was designed to shield."

2. USPS ARGUMENT

USPS summarized its argument as follows:

"The FTCA discretionary function exception protects the United States' sovereign immunity from liability in tort lawsuits for the results of its employees' decisions if the decisions were 1) subject to judgment or choice and not in violation of a mandatory and specific regulation, and 2) susceptible to policy analysis, regardless of whether such analysis was subjectively applied to the instant situation. In such instances, the question of negligence is irrelevant since it is the existence of the employees' discretion that is protected, even if that discretion was abused."

3. FIRST CIRCUIT DECISION

The First Circuit posed the claims as such:

Each plaintiff alleges that the Postal Service was guilty of negligence in designing and maintaining the premises of the Boqueron post office without "the most elemental means to protect the areas inside its facility used by the public to transact their business ... from intrusion and injury" by vehicles using the immediately adjacent parking areas. In their appellate briefs, the plaintiffs flesh out this allegation. They say, in essence, that The Postal Service negligently designed the parking lot and entrance to the post office, and that the plaintiffs' injuries could have been avoided if the Postal Service had placed some sort of curb or barrier in front of the building's entrance or had marked the parking spaces differently.

> "It is possible to characterize these plaints either as claims for improper design or as claims for negligent failure to furnish a safe place within which postal patrons could transact their wanted business. For present purposes, choosing between these labels would be a pointless exercise; the applicability of the discretionary function exception turns not on the nature and quality of the harm-producing conduct, not on the plaintiffs' characterization of that conduct."

See, Addendum, pgs. 10-21 Opinion; Judgment, Addendum pg. 22.

In Cope v. Scott, 45 F. 3d 445, the D. C. Circuit had occasion to determine, under Berkovitz v. United States, 486 U. S. 531 (1988), once the government has established that the challenged conduct involves an element of judgment or choice, whether that "judgment" is of the nature and quality that Congress intended to shield from tort liability:

> This brings us to the second step of the test, where the "basic inquiry" is whether the challenged discretionary acts of a government employee "are of the nature and quality that Congress intended to shield from tort liability." Varig, 467 U. S. at 813, 104 S. Ct. at 2764. Decisions that require choice are exempt from suit under the FTCA only if they are "susceptible to policy judgment" and involve an exercise of "political, social, [or] economic judgment." Gaubert, 499 U. S. at 325, 111 S. Ct. at 1275; Varig, 467 U. S. at 820, 104 S. Ct. at 2768; see Berkovitz, 486 U. S. at 537, 108 S. Ct. at 1959 (focusing the analysis on whether a decision is "based on consideration of public policy"). The Court recognized in Gaubert, for example, that daily decisions regarding the management of a troubled savings and loan "implicate[d] social, economic, or political policies," and were therefore exempt. Gaubert, 499 U. S. at 332, 111 S. Ct. at 1278. In contrast, the Court noted that a government employee may cause an automobile accident through the exercise of poor discretion, but that this type of "garden-variety" discretion is not protected. See id., 499 U. S. at 325 n.7, 111 S. Ct. at 1275 n.7. Only discretionary actions of greater significance–those grounded in "social, economic, or political goals"–fall within the protection of the statute. See Gaubert, 499 U. S. at 323, 111 S. Ct. at 1273.

Cope v. Scott, 45 F. 3d at 448.

In the instant case the plaintiffs proffered the corrective action that the USPS decision should have placed the parking spaces at the sides instead of in the front of the front entrance doors, and leave the spaces in front of the doors free of vehicles. The same would have required postings and parking markers to direct the cars away from the front entrance doors. At 45 F. 3d 452 the Cope court found that the discretion regarding where and what type of signs to post is not the kind of discretion protected by the discretionary function exception.

> "In contrast to our decision regarding the road surface, however, we find that the discretion regarding where and what type of signs to post is not the kind of discretion protected by the discretionary function exception. While it may be true, as the government claims, that the placement of signs involves judgments because engineering and aesthetic concerns determine where they are "fraught with public policy considerations" do they fall within the exception, and we do not think that is the case here. The "engineering judgment" the government relies on is no more a matter of policy than were the "objective scientific principles" that the Berkovitz court distinguished from exempt exercises of policy judgment. See 486 U. S. at 545, 108 S. Ct. at 1963."

I. REASONS FOR GRANTING PETITION

1. Poor judgment in placing parking spaces in front of front entrance to postal station which resulted in auto accident that caused injury to post office customers is not kind of choice or judgment which discretionary function exception to FTCA was designed to shield.

2. The government's waiver of immunity for injuries resulting from auto accidents in which Postal System is at fault excludes application of discretionary function exception, at initial or pleading phase of litigation.

3. A feckless standard for choice or judgment, will lead to the defeat of the central purpose of FTCA, which is to waive Government immunity from suit in sweeping language.

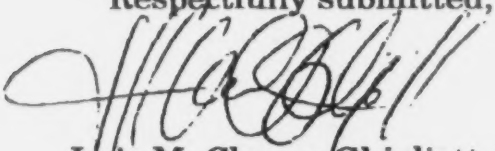
4. Whether allegation of auto accident in which postal system is at fault mandates a trial on the merits.

Thus there are important reasons for this Court to resolve the questions which emerge in the reasons for granting petition in the instant case.

J. CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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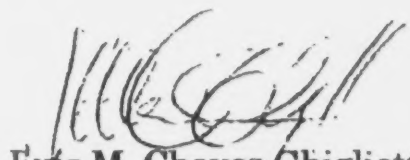
October 16, 2009

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Certiorari contains 4,444 words and has been prepared in 12-point proportionately-spaced Century Schoolbook type in WordPerfect 9.



Luis M. Chaves Ghigliotty

October 16, 2009

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CRUZ TERESA DEL TORO PIÑEIRO Plaintiff v. UNITED STATES OF AMERICA UNITED STATES POSTAL SERVICE Defendants	**Civil No. 07-1304 (SEC)**

OPINION AND ORDER

Pending before the Court is Defendant, the United States Postal Service's (USPS) motion to dismiss for lack of subject matter jurisdiction (Docket # 13), which stands unopposed. After reviewing the filings and the applicable law, Defendant's motion to dismiss will be **GRANTED**.

Factual Background

Plaintiff filed the above captioned complaint seeking redress for the personal injuries she suffered in a car accident within the USPS' premises. Plaintiff alleges that on April 25, 2005, she was retrieving her mail in the USPS

located in Boquerón, Puerto Rico. As she was closing her mailbox, a car ran through the front doors of the USPS and struck her. Docket # 4, ¶¶ 1-2. As a result of the accident, she "suffered multiple injuries to her right arm, both legs and groin, and numerous lacerations..." Id., at ¶ 3. Plaintiff argues that it is the USPS's responsibility to "provide security and safety" to its customers, see, Docket # 4, ¶ 4, but that it failed to do so since it failed "to provide the elemental measures to insure customers and visitors... [were free] from [the] intrusion of the vehicles maneuvering in the immediate area of [the] facilities...." Docket # 4, p. 7.

Plaintiff's complaint seeks relief under the Federal Torts Claim Act ("FTCA"). Docket # 4, ¶ 6. Defendant moved to dismiss the complaint arguing that there is no subject matter jurisdiction to entertain Plaintiff's FTCA claim because the decision whether to implement security measures in a public area is a discretionary function, an exception to the United States' waiver of its immunity pursuant to the FTCA. Plaintiff did not oppose the United States' motion to dismiss, and, as such, the motion stands unopposed.

Standard of Review

Fed. R. Civ. P. 12(b)(1)

Fed. R. Civ. P. 12(b)(1) is the proper vehicle for challenging a court's subject matter jurisdiction. Valentín v. Hospital Bella Vista, 254 F.3d 358, 362-63 (1st Cir. 2001). A plaintiff faced with a motion to dismiss for lack of subject matter jurisdiction has the burden to demonstrate that such jurisdiction exists. See, Lord v. Casco Bay Weekly, Inc., 789 F. Supp. 32, 33 (D. Me. 1992); see also, SURCCO V. PRASA, 157 F. Supp. 2d 160, 163 (D.P.R. 2001).

Applicable Law and Analysis

It is well settled law that the United States ("U.S."), as sovereign, is immune from suit. However, the United States, in the exercise of its sovereignty, may waive its immunity. The U.S. did so through the FTCA which allows plaintiffs to sue for torts resulting from "the negligent or wrongful acts or omissions of any employee of the Government while acting within the scope of his employment." 28 U.S.C.A. § 2679(b)(1).

The FTCA waiver, however, is far from absolute, as it is subject to a variety of exceptions. One of the exceptions is contained in 28 U.S.C.A. § 2680(a), which provides that "[a]ny claim...

based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency... whether or not the discretion involved be abused" is not actionable under the FTCA. Therefore, if the alleged negligent act -in this case, the USPS failure to maintain security rails to prevent the entry of vehicles in the mailbox area- can be catalogued as a discretionary function, then the Court lacks jurisdiction to entertain the tort action against the U.S. See, Gaubert v. U.S., 499 U.S. 315 (1991); Berkovitz by Berkovitz v. U.S., 486 U.S. 531 (1988).

In determining whether a challenged action or omission is an exercise of a discretionary function, the Court must ask if the action or omission "involve[s] an element of judgment or choice." Gaubert, 499 U.S. at 322. What is important is the nature of the action, rather than the status of the actor. Id. The purpose of the exception is to "prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." Id. The determination of whether an action is discretionary rests in a two-part test; the action is discretionary only if: (1) it was not

governed by a mandatory statute, policy or regulation, and (2) it involves a decision susceptible to social, economic, or political policy analysis." Berkovitz v. U.S., 486 U.S. 531, 536-37 (1988).

Because the USPS has challenged the Court's subject matter jurisdiction, it is Plaintiff's burden to establish that such jurisdiction exists. See, Hospital Bella Vista, 254 F.3d at 366 . However, Plaintiff has not set forth any mandatory rule or policy requiring the USPS to maintain barriers between the parking lot and the lobby. Furthermore, we believe that the decision whether to maintain rails or barriers within the USPS parking lot, as any design decision, is a discretionary action involving policy considerations. See, Domingues v. U.S.P.S., 2007 WL 1500832, at p. 3 (N.D. Cal. 2007)("Parking lot safety decisions, like building security, are susceptible to policy considerations. Accordingly, the decision not to improve safety in the parking lot is susceptible to policy considerations.") We agree with the Defendant that, in order for USPS to determine whether to improve security in the parking lot, it "must weigh and prioritize space, budget, accessibility, service, and safety concerns."

Docket # 13, p. 7. In doing so, the USPS must, necessarily, engage in social, economic and policy considerations.

This conclusion is consistent with First Circuit precedent. See, Ayer v. U.S., 902 F. 2d 1038 (1st Cir. 1990)(Decision of Air Force not to include safety railings or make other safety changes in launch control capsule fell within the FTCA's discretionary function exception.); see also, Briggs v. Washington Metropolitan Area Transit Authority, 293 F. Supp. 2d 8, 13 (stating that the U.S.'s failure to light the area surrounding a metro station, which according to the plaintiff made the area unsafe, was discretionary and involved policy considerations on "how to most effectively use its resources."). As in Ayer and Briggs, the Plaintiff here attributes negligence to the USPS' decision not to erect barriers between the parking lot and the lobby in order to protect its customers from vehicles driving within its premises. We find that the USPS' decision involved social, economic and policy considerations. Because Plaintiff has not averred, much less established, that the barriers were required by any law, or internal policy, and having concluded that the determination involves an element of judgment or

choice, the discretionary function exception applies in full force.

Conclusion

In light of the above, the USPS' motion to dismiss for lack of subject matter jurisdiction (Docket # 13) is hereby **GRANTED**. Plaintiff's claim under the Federal Torts Claim Act is hereby **DISMISSED with prejudice.**

SO ORDERED.

In San Juan, Puerto Rico, this 6th May, 2008.

S/ Salvador E. Casellas

SALVADOR E. CASELLAS
S/U.S. *Salvador E. Casellas*

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

LUCY FOTHERGILL, Plaintiff v. UNITED STATES OF AMERICA (United States Postal Service), Defendant	CIVIL NO. 07-1378 (JP)

OPINION AND ORDER

Before the Court is a motion to dismiss filed by Defendant United States of America ("USA") (**No. 5**). The motion is unopposed. The instant complaint was filed by Plaintiff Lucy Fothergill ("Fothergill") under the Federal Tort Claims Act, 28 U.S.C.

section 2675 ("FTCA"), for injuries she suffered when a car crashed through the main entrance of the Boquerón Postal Facility in Boquerón, Puerto Rico. Plaintiff was inside said premises when the car knocked her into the P.O. boxes, causing her

to hit her head and fall onto the shattered glass on the floor below. She allegedly sustained multiple cuts and lacerations as a result, and was taken by ambulance to a hospital for medication and treatment. She argues that Defendant USA was negligent for failing to protect the areas inside the postal facility from the intrusion of vehicles in the immediate parking area. Defendant USA argues that it is immune from suit under the FTCA for failure to install barriers in front of the postal office because said decision falls under the discretionary function exception of the FTCA.

For the reasons stated herein, the Court **GRANTS** Defendant USA's motion to dismiss.

I. LEGAL STANDARD FOR A MOTION TO DISMISS

According to the United States Supreme Court, "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007). As such, in order to survive a motion to dismiss, a

complaint must state a claim to relief that is plausible on its face, not merely conceivable. Id. at 1974. The First Circuit has interpreted Twombly as sounding the death knell for the oft-quoted language of Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed

for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Rodríguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 94-95 (1st Cir. 2007), quoting Twombly, 127 S. Ct. at 1969. Still, a court must "treat all allegations in the Complaint as true and draw all reasonable inferences there from in favor of the plaintiff." Rumford Pharmacy, Inc. v. City of East Providence, 970 F.2d 996, 997 (1st Cir. 1992). Under Federal Rule of Civil Procedure 8(f), "[a]ll pleadings shall be so construed as to do substantial justice."

II. ANALYSIS

Plaintiff Fothergill filed the instant complaint against Defendant USA for damages pursuant to the FTCA. In her complaint, Plaintiff alleges that Defendant USA was

negligent for failing to protect the postal facility from intrusion from vehicles in the immediate parking area. Plaintiff sets forth no additional arguments in her opposition to the motion to dismiss, as no opposition was filed. Defendant alleges that a United States Postal Service ("USPS") investigation conducted after the accident revealed that the vehicle involved in the accident was a 1997 Ford Escort automobile owned and operated by a private individual, not a party to the instant suit, who confused the brake pedal with the accelerator when attempting to park. USPS's investigation further revealed that cement parking barriers exist in the parking lot, and that the parking spaces are clearly marked.

It is well established that the United States is immune from suit unless it has expressly consented to be sued. See United States v. Mitchell, 445 U.S. 535, 538 (1980). The FTCA waives sovereign immunity for tort suits, subject to a number of exceptions, including the discretionary-function exception. See 28 U.S.C. § 2680(a); United States v. Gaubert, 499 U.S. 315,

322 (1991). Under that exception, sovereign immunity is not waived for any claim based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). Whether or not certain conduct falls within the discretionary-function exception depends on two determinations. First, a court must consider whether the conduct was "a matter of choice for the acting employee." Bolduc v. United States, 402 F.3d 50, 60 (1st Cir. 2005) (internal quotation marks omitted). Any conduct required by federal statute, regulation, or policy is not considered discretionary. Id. Second, if the conduct was discretionary, a court must then determine whether it was "susceptible to policy-related judgments," that is, whether it involved "an unrestrained balancing of incommensurable values, including a differential allocation of resources among various political objectives." Id. (internal quotation marks omitted).

In considering whether the decision to install barriers in front of the Boquerón Postal facility is a matter of choice, the Court notes first that Plaintiff Fothergill has cited to no mandatory rule or policy requiring barriers between the parking lot and the postal office entrance. Plaintiff has produced no evidence showing that Defendant USA lacked the discretion to determine safety measures at the postal office. Thus, there was no existing obligation on behalf of Defendant to install barriers to the front entrance.

The remaining issue is whether this case involves the kind of policy concerns protected by the discretionary function exception. The decision as to how to design a postal office is to a certain degree discretionary in nature, as each location is unique in its resources, circumstances, and needs. Likewise, the decision whether to erect barriers would require the postal office to consider various business and policy issues, including expenses, the postal office's mission to provide mail services, and safety. See generally Ayer v. United States, 902 F.2d 1038 (1st Cir. 1990) (holding that the Air Force's

decision not to include safety railings or to make other configurational changes at its launch control facilities fell within the discretionary-function exception). Finally, Defendant USA was not ignoring minimal safety standards, as cement parking barriers were already installed in the parking area at the time of the accident, and the parking area was clearly marked. See generally Attallah v. United States, 758 F. Supp. 81, 90 (D.P.R. 1991), citing Haygan v. United States, 627 F. Supp. 749 (D.D.C. 1986) (stating that government security is discretionary in nature).

The Court holds that the decision to install barriers in front of the Boquerón Postal facility is discretionary in nature, involving an element of judgment or choice as well as policy considerations. Therefore, Defendant USA is immune from suit under the FTCA.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 19th day of December 2007.

s/Jaime Pieras, Jr.

JAIME PIERAS, JR.
U.S. SENIOR DISTRICT JUDGE

United States Court of Appeals
For the First Circuit

No. 08-1365

LUCY FOTHERGILL,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA

(UNITED STATES POSTAL SERVICE),

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., U.S. District Judge]

No. 08-1951

CRUZ TERESA DEL TORO PINEIRO,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA

(UNITED STATE POSTAL SERVICE),

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Salvador E. Casellas, U.S. District Judge]

Before
Howard, Selya and Hansen , Circuit Judges.

Luis M. Chaves Ghigliotty on brief for appellants.

Ray E. Donahue, Acting Chief Counsel, Appellate Division,United States Postal Service, Michelle A. Windmueller, Attorney,Appellate Division, and Rosa Emilia Rodríguez-Vélez, United StatesAttorney, on brief for appellee.

May 21, 2009

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*Of the Eighth circuit, sitting by designation.

SELYA, Circuit Judge. These appeals arise out of a freak accident that occurred on April 25, 2005, at a post office in Boqueron, Puerto Rico. On that date, two unrelated parties (plaintiffs Lucy Fothergill and Cruz Teresa del Toro Pineiro) happened to be inside the facility. Each woman was bent on transacting routine business.

In the same time frame, another postal customer was maneuvering her car in the parking lot. That customer accidentally drove her vehicle through the front entrance of the building and into its public area. Both plaintiffs sustained injuries as a result of the mishap.

After complying with applicable administrative preconditions, the women instituted separate civil actions against the United States, as a surrogate for the United States Postal Service, under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680. We chronicle the travel of these actions.

On May 2, 2007, Fothergill filed a complaint alleging that the United States was liable in tort for her damages.

The government responded by moving to dismiss the action for want of subject-matter jurisdiction. Astonishingly, Fothergill did not oppose the motion.

Well after the expiration of the deadline for filing an opposition to the government's motion, the district court (Pieras, J.) granted the unopposed motion on the ground that the FTCA's discretionary function exception foreclosed the claim. See Fothergill v. United States, No. 07-cv-01378, slip op.
at 5 (D.P.R. Dec. 19, 2007) (unpublished). Fothergill moved unsuccessfully for reconsideration and later appealed.

The same attorney represented the other plaintiff, del Toro. It is, therefore, unsurprising that her action traveled a similar path. She sued on April 11, 2007; her complaint alleged that the United States was liable in tort for her damages under the FTCA; and on September 22, 2007, the government moved to dismiss the complaint for want of subject-matter jurisdiction. The plaintiff did not deign to file an opposition to the government's motion.

On May 6, 2008, the district court (Casellas, J.) dismissed the action, holding that the FTCA's discretionary function exception barred its further prosecution. See Del Toro Pineiro v. United States, No. 07-cv-01304, slip op. at 4 (D.P.R. May 6, 2008) (unpublished). In a binary move, del Toro sought reconsideration and served a notice of appeal. After the district court declined to revisit its dismissal of the action, del Toro amended her notice of appeal.

Fothergill's and del Toro's appeals present the same central issue. Thus, we consolidated them.

The courts below acted in response to motions to dismiss for lack of subject-matter jurisdiction. See Fed. R. Civ. P. 12(b)(1). When such decisions are made on the pleadings, they engender de novo review. See, e.g., McCloskey v. Mueller, 446 F.3d 262, 266 (1st Cir. 2006); see also Irving v. United States, 162 F.3d 154, 162 (1st Cir. 1998) (en banc) (explaining that de novo review is appropriate for a conclusion that the FTCA's discretionary function exception applies). In carrying out that task, we take as true all well-

pleaded facts in the plaintiffs' complaints, scrutinize them in the light most hospitable to the plaintiffs' theory of liability, and draw all reasonable inferences therefrom in the plaintiffs' favor[1]. See Muñiz-Rivera v. United States, 326 F.3d 8, 11 (1st Cir. 2003). If the well-pleaded facts, evaluated in that generous manner, do not support a finding of federal subject-matter jurisdiction, the orders of dismissal must stand. See id.

Here, however, the usual, plaintiff-friendly standard of review is tilted. After all, neither plaintiff opposed the government's motion to dismiss. Consequently, the plaintiffs have forfeited the argument in favor of subject-matter jurisdiction. See, e.g., United States v. Leahy, 473 F.3d 401, 409-10 (1st Cir.2007). Our review, accordingly, is only for plain error. See, e.g., Dávila v. Corporación De P.R. Para La Difusion Publica, 498 F.3d 9, 14-15 (1st Cir. 2007); Cipes v. Mikasa, Inc., 439 F.3d 52, 56 (1st Cir. 2006). Review for plain error places a formidable obstacle in an appellant's path. A simple showing of error no longer will suffice. Rather, the appellant must make a four -part showing: "(1) that an error occurred (2) which was clear or obvious

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[1]This standard applies to motions to dismiss for want of subject-matter jurisdiction that are adjudicated on the pleadings, in advance of jurisdictional discovery and without the taking of any evidence. Given the procedural posture of these appeals, we need not dwell upon the standards that

pertain in other circumstances. See, e. g., Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 147-48 (1st Cir. 1995) (describing various standards). and which not only (3) affected the [appellant's] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). We discern no error here, plain or otherwise.

The FTCA dominates the topography of this case. That statute comprises a limited waiver of the federal government's sovereign immunity with respect to private causes of action sounding in tort. Shansky v. United States, 164 F.3d 688, 690 (1st Cir. 1999). The plaintiffs sued on the basis of this limited waiver, but the government asserts that the plaintiffs' claims fall outside the waiver's boundaries. If that assertion holds water, the FTCA affords no license for suing the federal government (and, thus, no footing for the instant actions). See Hydrogen Tech. Corp. v. United States, 831 F.2d 1155, 1160 (1st Cir. 1987). These appeals hinge, then, on the credibility of the government's assertion.

Congress has specified various situations in which the FTCA's circumscribed waiver of sovereign immunity will not attach. See 28 U.S.C. § 2680. One such specification, pertinent here, relates to claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government . . . ." Id. § 2680(a). The courts below held that this provision controlled here. The analytic framework used in connection with the discretionary function inquiry is familiar: a court first must identify the conduct that is alleged to have caused the harm, then determine whether that conduct can fairly be described as discretionary, and if so, decide whether the exercise or nonexercise of the granted discretion is actually or potentially influenced by policy considerations. See Bolduc v. United States, 402 F.3d 50, 60 (1st Cir. 2005); Shansky, 164 F.3d at 691-92.

This brings us to the claims at hand. To begin, each plaintiff alleges that the Postal Service (and, thus, the United States) was guilty of negligence in designing and maintaining the

how the conduct is denominated, the focus of the plaintiffs' complaints is on the Postal Service's decision making with respect to the implementation (or eschewal) of safety measures in connection with its operation of the post office.

Having identified the harm-producing conduct, we proceed to the second facet of the inquiry. In carving out the discretionary function exception, Congress wanted to prevent courts from second-guessing legislative and administrative decision making. See id. at 536-37; United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984). Thus, the next step is to determine whether the identified conduct involves a matter that the political branches have left to the actor's choice.

At its core, the identified conduct involves decisions about what safety measures should be included and what should be excluded in the layout of the post office and its appurtenant amenities. On the record before us, those decisions were wholly discretionary. The plaintiffs have identified no law, regulation, rule, or other requirement that tied

premises of the Boqueron post office without "the most elemental means to protect the areas inside its facility used by the public to transact their business . . . from intrusion and injury" by vehicles using the immediately adjacent parking areas. In their appellate briefs, the plaintiffs flesh out this allegation. They say, in essence, that the Postal Service negligently designed the parking lot and the entrance to the post office, and that the plaintiffs' injuries could have been avoided if the Postal Service had placed some sort of curb or barrier in front of the building's entrance or had marked the parking spaces differently.

It is possible to characterize these plaints either as claims for improper design or as claims for negligent failure to furnish a safe place within which postal patrons could transact their wonted business. For present purposes, choosing between these labels would be a pointless exercise; the applicability of the discretionary function exception turns on the nature and quality of the harm-producing conduct, not on the plaintiffs' characterization of that conduct. See Berkovitz v. United States, 486 U.S. 531, 536 (1988). Here, regardless of

the Postal Services hands in configuring and outfitting either the building or its adjacent parking areas. In the absence of any such circumscription, the pertinent decisions are matters of executive choice (that is, matters committed to the discretion of the responsible officials). See, e.g., Shansky, 164 F.3d at 691-92; Irving, 162 F.3d at 162-63.

The last phase of the inquiry requires us to determine whether this discretion is of the type and kind that Congress sought to safeguard through the discretionary function exception. See United States v. Gaubert, 499 U.S. 315, 322-23 (1991); Berkovitz, 486 U.S. at 536-37. That question is easily answered here. Deciding whether to install curbs or barriers in a parking lot, when to do so, how to array them, and the like are about which reasonable persons can differ. In the last analysis, those choices are informed by a need to balance concerns about a myriad of factors such as efficiency, safety, aesthetics, and cost. In other words, those choices are readily susceptible to policy analysis.

No more is exigible. So long as there is room for differing policy judgments, there is discretion of the type and kind shielded by section 2680(a). See Berkovitz, 486 U.S. at 537; Shansky, 164 F.3d at 692-93.

There remain two loose ends. We address each of them briefly.

First, the plaintiffs argue that there is no indication that the Postal Service ever undertook to weigh the competing policy concerns that we have identified. That argument is unavailing.

The law imposes no requirement that the government, as a prerequisite to invoking the discretionary function exception, demonstrate that a policy judgment actually was made. The discretionary function exception applies to all acts and omissions that are susceptible to policy analysis, whether or not that analysis has been performed on a given occasion. See Gaubert, 499 U.S. at 324-25; Irving, 162 F.3d at 162.

Second, the plaintiffs condemn the negligence that infuses the Postal Service's conduct. But even if the Postal

Service acted negligently — a matter on which we take no view — that shortcoming would not profit the plaintiffs. We already have established that the challenged conduct is of the nature and quality that Congress intended to protect by means of the discretionary function exception. Once that precondition has been satisfied, the prophylaxis of the exception attaches regardless of whether the decisionmaker acted negligently or manifestly abused the granted discretion. See Ayer v. United States, 902 F.2d 1038, 1041 (1st Cir. 1990); see also 28 U.S.C. § 2680(a) (deeming immaterial the question of "whether or not the discretion involved [was] abused").

We need go no further. In this instance, the plaintiffs have neither alleged the existence of, nor otherwise identified, any mandatory law, rule, regulation, or policy that required the Postal Service to install curbs or barriers in front of the Boqueron post office, to lay out the parking lot in any special way, or otherwise to design or maintain the premises in a manner that might have averted this unfortunate

accident. For aught that appears, the design criteria were in relevant part matters of unfettered executive choice. Since the choices relative to design were susceptible to policy analysis, the courts below did not err in applying the discretionary function exception and dismissing the plaintiffs' suits.

Affirmed.

United States Court of Appeals
For the First Circuit

No. 08-1365

LUCY FOTHERGILL,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA
(UNITED STATES POSTAL SERVICE),

Defendant, Appellee.

No. 08-1951

CRUZ TERESA DEL TORO PINEIRO,

Plaintiff, Appellant,

v.

UNITED STATES OF AMERICA
(UNITED STATE POSTAL SERVICE),

Defendant, Appellee.

JUDGMENT
Entered: May 21, 2009

This cause came on to be submitted on the briefs and original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered,

adjudged and decreed as follows: The judgment of the district court is affirmed.

By the Court:

/s/ Richard Cushing Donovan, Clerk

cc: Mr. Chaves-Ghigliotty, Ms. Milanes, Ms. Windmueller, Mr. Perez-Sosa & Mr. Donahue.